Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of The United States
October Term 1998

ROBERT VARDANEGA,
Petitioner,

v.

UNITED STATES OF AMERICA
INTERNAL REVENUE SERVICE,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL H. GREISEN*
Greisen Law Corporation
4112 Crestline Avenue, Suite 2
Fair Oaks, California 95628
(916) 967-8338

Attorney for Petitioner
**Counsel of Record*

APPELLATE ADVANTAGE
POST OFFICE BOX 7506 ◆ KANSAS CITY, MO 64116 ◆ 816-453-2424

QUESTIONS PRESENTED FOR REVIEW

1. Does the INTERNAL REVENUE SERVICE (hereinafter "**IRS**") have a statutory right to redeem property from foreclosure and sell it to pay the taxes of a delinquent taxpayer if such property was never owned by the delinquent taxpayer and was never subject to an **IRS** lien?

2. Is a statute permitting the taking described in 1 above constitutional?

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

OPINIONS AND ORDERS BELOW v

JURISDICTION v

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED vi

STATEMENT OF THE CASE 1

ARGUMENT 2

The Appellate Court Interpretation Ignores the Plain Language of the Statute 3

The Appellate Court has Interpreted the Statute in a way that Renders it Unconstitutional 5

CONCLUSION 8

APPENDIX
Exhibit A
Memorandum of Opinion for

the United States Court of Appeals for the Ninth Circuit filed March 19, 1999. ..... A-1

Exhibit B

Order re Cross Motions for Summary Judgment of the Honorable Milton L. Schwartz, Judge of the United States District Court for the Eastern District of California, filed November 7, 1997 in Case No. CIV-S97-938 MLS/JFM. B-12

Exhibit C

Judgment in a Civil Case, Case No.CIV S-97-938 MLS/JFM, filed December 1, 1997. ..... C-26

Exhibit D

Order Denying Appellate Petition Rehearing dated April 23, 1999. ..... D-27

Exhibit E

26 USC, Section 7425 ..... E-28

Exhibit F

Articles in Addition to, and Amendment of, the Constitution of the United States of America, Proposed by Congress, and Ratified by the Legislatures of the Several States Pursuant to the Fifth Article of the Original Constitution F-34

TABLE OF CITATIONS

Pages

Cases Cited:

Shelton v. United States
19 CL.Ct. 247 (1990) 5

Statutes Cited:

26 United States Code, Section 7425 . . . . . vi, 2, 4, 7

26 United States Code, Section 7425(b) 4

26 United States Code, Section 7425(d) 3, 4

28 United States Code, Section 1254(1) vi

28 United States Code, Section 1331 2

OPINIONS AND ORDERS BELOW

1. MEMORANDUM OF OPINION FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT filed March 19, 1999. **(Exhibit A of the Appendix hereto).**

2. ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT of the Honorable Milton L. Schwartz, Judge of the United States District Court for the Eastern District of California, signed November 25, 1997 in Case No. CIV-S-97-938 MLS/JFM **(Exhibit B of the Appendix hereto).**

3. JUDGMENT IN A CIVIL CASE, Case No. CIV-S-97-938 MLS/JFM filed December 1, 1997 **(Exhibit C of the Appendix hereto).**

4, ORDER denying Appellate Petition for Rehearing filed April 23, 1999 **(Exhibit D of the Appendix hereto).**

JURISDICTION

The Memorandum of Opinion of the United States Court of Appeals for the NINTH CIRCUIT was filed on March 19, 1999. **(Exhibit A of the Appendix hereto).**

Appellant's Petition for Rehearing was denied on April 23, 1999 **(Exhibit D of Appendix hereto).**

The jurisdiction of the United States Supreme Court to review the decision of the Court of Appeals is under 28

United States Code (hereinafter "USC") Section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved in this case is 26 USC, Section 7425. **(Exhibit E of Appendix hereto).**

The constitutional provision involved is the due process Clause which reads in pertinent part:

> "... not be deprived of .... property without due process of law....".Fifth Amendment to U.S. Constitution.

The full text of the Fifth Amendment is set forth at **Exhibit F of the Appendix hereto**

STATEMENT OF THE CASE

Appellant, ROBERT VARDANEGA (hereinafter "**VARDANEGA**") purchased property at a foreclosure sale **(Exhibit A, page A-2, paragraphs 2 and 3 of the Appendix hereto)**. Prior to the foreclosure sale, the property was owned by three persons in equal shares. **(Exhibit A, page A-2, paragraph 2 of the Appendix hereto)**. One of the co-owners of the subject property, was subject to an **IRS** lien for unpaid taxes encumbering her one-third interest. The two other co-owners had no **IRS** lien encumbering their respective interests. The **IRS** lien was junior to the deed of trust being foreclosed upon **(Exhibit B, page B-18, paragraph 1 of the Appendix hereto)**. Following the sale, the **IRS** recorded a Notice of Redemption of the delinquent taxpayer's one-third interest **(Exhibit B, page B-23, 1st full paragraph of the Appendix hereto)**.

Thereafter the **IRS** took the position that it had redeemed one hundred percent (100%) of the property. **(Exhibit B, page B-21, 3rd full paragraph of the Appendix hereto)**. **VARDANEGA** brought the instant action to quiet title to a two-thirds interest in the subject property. Both sides moved for summary judgment.

The court granted the **IRS** motion and denied Appellant's cross motion **(Exhibit B, page B-14, paragraph 2 of the Appendix hereto)** holding that the **IRS** had a right to redeem and acquire ownership of 100% of the property **(Exhibit B, page B-23, 1st full paragraph of the Appendix hereto).**

The Appellate Court for the Ninth Circuit affirmed the

Judgment in all respects **(Exhibit A, page A-11, last full paragraph of the Appendix hereto).**

The Federal District Court had jurisdiction in this matter as a federal question pursuant to 28 USC, Section 1331 and 26 USC, Section 7425.

ARGUMENT

The Federal Court of Appeals for the NINTH CIRCUIT has decided an important question of federal law that has not been settled, but should be settled by this court.

The court has decided that Respondent, INTERNAL REVENUE SERVICE (hereinafter "**IRS**") may divest the legal owner of title to, and sell real property for the benefit of a delinquent taxpayer even though the delinquent taxpayer has never at any time owned such property and the **IRS** has never at any time had a lien on the property.

This published Opinion is now citable precedent for the **IRS** to engage in conduct that is either in excess of the power conferred upon it by statute or is unconstitutional. The threat that the **IRS** may seize property from purchasers at foreclosure sales is disruptive to the foreclosure process, chills bidding and provides windfalls to delinquent taxpayers at the expense of persons who pay their taxes.

Without a decision settling this issue, purchasers at foreclosure sales, in jurisdictions other than the Ninth Circuit, will be uncertain as to what interest they may acquire at foreclosure sales and may therefore refuse to bid, or bid less than they would otherwise bid because of the uncertainty.

This will work to the detriment of the trustors whose property is being sold and to the detriment of junior lienholders, as far fewer overbids will be made. Within the Ninth Circuit there will be few, if any, third party bidders if the **IRS** has a lien on any fractional interest in a property sold at foreclosure sale.

It will also be disruptive to the practice of lenders who, for want of an overbid, will acquire property rather than being paid off as a consequence of the sale. Since most lenders are in the lending business and do not wish to be in real estate sales, they may adjust interest rates and loan to equity ratios to deal with this situation.

The Appellate Court Decision Ignores the Plain Language of the Governing Statute

The portion of the statute upon which the court relies to uphold the **IRS'** seizure of Petitioner, "**VARDANEGA's**" property is quoted in the opinion as follows:

> "In the case of a sale of real property . . . to satisfy a lien prior to that of the United States, the Secretary may redeem such property within the period of 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer...
> 26 U.S.C. Section 7425(d) (1994)"
> **(Exhibit A, page A-6 of the Appendix hereto).**

VARDANEGA argued that the term "such property" in the above cited section refers only to the property on which

the **IRS** had a lien. *Ibid* at 7a, paragraph 1.

The court responded that to hold that the term"such property" in the above quoted section refers to property on which the government has a lien would require a "strained construction of the statute". *Ibid.*

VARDANEGA submits that to find that "such property" means the property "on which the **IRS** has a lien" requires no construction at all. These are the very words of the statute. The court omitted the crucial language of the statute in the citation above. The words omitted where the three dots appear in the above cited section are: "to which subsection (b) applies."26 USC, Section 7425(d). **(Exhibit E, page E-31, paragraph (d)(1) of the Appendix hereto).**

The property to which subsection (b) applies is: "property on which the IRS has or claims a lien." 26 USC, Section 7425(b). *Ibid*, page 30a, paragraph (b).

Thus, the only possible reference for the words "such property" in the section quoted by the court, and everywhere it appears in the statute, is to the very words the court states could not be found without a strained construction. The court has therefore made a crucial error of law as to the issue it has correctly deemed dispositive. (It is crucially important for the court to note that in all of the case law cited by either side the courts use the term "property" with reference to 26 USC, Section 7425. To apply these cases to the instant case therefore, they must be read with the statutory definition in mind, i.e. property interests encumbered by the **IRS** lien. The issue present in this case was not present in any cited case. Furthermore, whenever the tax lien is discussed it is in

relation to a situation in which the entire property was owned by the tax payer prior to foreclosure. Therefore, in these cases there was no need to distinguish between the term "property" when used to refer to the whole property and the term "property" when used in reference to property interests encumbered by the **IRS** lien as these were identical. In this case, however, the distinction is dispositive.).

The above language of the statute clearly limits the acquisition of property by the **IRS** to that in which it held a lien prior to the foreclosure sale.

The Appellate Court has Interpreted the Statute in a way that Renders it Unconstitutional

Although **VARDANEGA** contends the clear language of the statute limits the **IRS** to redemption of the property to which its lien attaches, if the court perceives an ambiguity it certainly must adopt an interpretation that would make the statute constitutional. **VARDANEGA** contends that the statute is constitutional if interpreted to allow the **IRS** to redeem the property which its lien encumbered, but to not allow the **IRS** to redeem property which the **IRS** lien did not encumber. The interpretation urged by the **IRS** would cause that statute to be unconstitutional as it would permit an impermissible taking, allowing the **IRS** to take property which the delinquent taxpayer never owned from a third party.

The criteria for determining whether a statute authorizes an unconstitutional taking were set forth in Shelton v. United States 19 CL.Ct.247 (1990). These are:

First, the government must have invaded or interfered with plaintiff's property.

Second, the government's invasion must have deprived plaintiff of a substantial right or interest in plaintiff's property.

Third, the government's invasion must have been a direct act.

Fourth, the government's invasion of plaintiff's property must be permanent or inevitably recurring.

Fifth, the government's invasion of plaintiff's property must be authorized by Congress.

Sixth, the government must have usurped plaintiff's property to benefit the public. *Ibid* 251-252.

Each of these would be present under the **IRS** interpretation of the statute.

1. Interference The government takes property in which it never had a prior interest away from the purchaser who, at the time of the redemption, has become the owner of such property pursuant to state law.

2. Deprivation of Substantial Right. The government deprives the owner of the right to the profit on the resale of the property which is clearly the benefit purchased at the foreclosure sale.

3. Direct Act. The IRS directly divests the owner of

title.

4. Permanent Invasion. The taking is irreversible.

5. Authorized by Congress. Under the IRS interpretation the taking is authorized by 26 USC, Section 7425, a federal statute.

6. Benefit to the Public. Payment of delinquent taxes from the proceeds of the sale of plaintiff's property is a clear benefit to the public.

VARDANEGA contends that the interpretation of the statute he urges is both reasonable and constitutional, and must therefore be adopted as opposed to that urged by the **IRS,** which would render the statute unconstitutional.

The Appellate Court disposes of the constitutional issue on the basis of "notice". **(Exhibit A, page A-3, paragraph [5] of the Appendix hereto).** However, the court cites no authority for the proposition that notice of the existence of an unconstitutional statute cures the unconstitutionality.

CONCLUSION

The court should grant this petition to decide an important point of law with wide applicability. To fail to decide this issue will be disruptive to a process which plays a crucial and fundamental part in credit transactions, affects interest rates, investment decisions and chills the bidding at foreclosure sales, to the detriment of persons whose property is foreclosed upon and to junior lienholders.

Dated: June, 1999

GREISEN LAW CORPORATION

PAUL H. GREISEN,
ATTORNEY FOR PETITIONER,
ROBERT VARDANEGA

4112 Crestline Avenue, Suite 2
Fair Oaks, California 95628
(916) 967-8338

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October Term, 1998

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UNITED STATES OF AMERICA
INTERNAL REVENUE SERVICE

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

PAUL H. GREISEN
GREISEN LAW CORPORATION
4112 Crestline Avenue, Suite 2
Fair Oaks, California 95628
(916) 967-8338

Attorney for Petitioner

APPENDIX
EXHIBITS

EXHIBIT A — MEMORANDUM OF OPINION FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT filed March 19, 1999.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT VARDANEGA
Plaintiff-Appellant,
v.
INTERNAL REVENUE SERVICE,
Defendant-Appellee

No. 97-17301
D.C. No.
CV-97-00938-MLS/JFM

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, District Judge Presiding

Argued and Submitted
February 12, 1999 — San Francisco, California

Filed March 19, 1999

Before: Harlington Wood, Jr.[1], David R. Thompson, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

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[1]The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

SUMMARY

Tax/Tax Liens

The court of appeals affirmed a judgment of the district court. The court held that under Section 7425 of the Internal Revenue Code, the **IRS** may redeem the entire property purchased at a foreclosure sale on which it has a lien.

In 1991, Donna Benedetti, Cathleen Benedetti, and Dorothy Wildes acquired property on Carsten Circle in Solano County, California as coequal joint tenants. In 1993, the three obtained a loan on the property secured by a deed of trust. In 1995, the **IRS** filed a notice of tax lien in Solano County against Donna Benedetti for $46,595 in unpaid taxes.

Windsor Management Company, the trustee for the deed of trust, foreclosed on the Carsten property and notified the **IRS** of the impending sale. In December 1996, appellant Robert Vardanega bought the property for $105,881 at the foreclosure sale. He had actual knowledge of the **IRS** tax lien. On April 14, 1997, the **IRS** redeemed the property by sending Vardanega a check for $107,970, the price he paid plus interest.

Vardanega believed that under Section 7245, the **IRS** could redeem only the property interest against which it had a lien, i.e., Donna Benedetti's one-third undivided interest. He attempted to return to the **IRS** two-thirds of the amount of the check it had sent him. The **IRS** rejected the payment and recorded a certificate of redemption.

Vardanega sued the **IRS** to quiet title in the Carsten property and for partition. The IRS sold the entire property to the GH-A Corporation for $172,300. Both sides moved for summary judgment. The district court ruled for the **IRS**. Vardanega appealed.

[1] Section 7425 allows the **IRS** to redeem the entire real property that was sold at a foreclosure sale if any portion of the property was subject to a federal tax lien prior to the sale. [2] If Congress had intended to limit redemption to only a portion of the property, it could have stated so explicitly. By its terms, the statute allows the **IRS** on redemption to step into the shoes of the foreclosure purchaser, not those of the delinquent taxpayer.

[3] The statutory amount that the **IRS** is required to pay the purchaser on redemption supports this holding. To redeem the property, the United States may pay the amount paid by the purchaser, plus interest and other costs. This requirement compels the conclusion that the **IRS** redeems the whole property, and not the equivalent of its tax lien. [4] The legislative history also supports this interpretation.

[5] When Vardanega purchased the Carsten property, he purchased it with notice of an encumbrance — the statutory right of redemption by the United States. He therefore did not purchase clear title, but encumbered property. By exercising its right of which Vardanega had notice, the **IRS** did not divest him of any vested property interest in violation of the Fifth Amendment. [6] Further, Vardanega was reimbursed for all the money he spent to purchase the property. What he "lost" was the right to get a windfall at the expense of the taxpayer and the other owners

of the property.

COUNSEL

Paul H. Greisen, Greisen Law Corporation, Fair Oaks, California, for the plaintiff-appellant.

William S. Estabrook, Murray S. Horwitz, Charles F. Marshall, Tax Division, United States Department of Justice, Washington, D.C., for the defendant-appellee.

OPINION

THOMAS, Circuit Judge:

Robert Vardanega appeals a decision of the U.S. District Court for the Eastern District of California. The district court in this case granted summary judgment in favor of the Internal Revenue Service ("**IRS**") in Vardanega's action to quiet title in real property. Vardanega argued below that 26 U.S.C. Section 7425 permits the **IRS** to redeem only the exact property interest on which it has a tax lien. The district court disagreed and held that the statutory language of Section 7425 permits the **IRS** to redeem the entire real property on which it has a lien that is purchased at a foreclosure sale. We have jurisdiction pursuant to 28 U.S.C. Section 1291, and affirm the decision of the district court.

I

In 1991, Donna Benedetti, Cathleen Benedetti, and Dorothy Wildes acquired property at 821 Carsten Circle in

Solano County, California (the "Carsten property") as coequal joint tenants. In February 1993, the three owners obtained a loan on the property secured by a properly recorded deed of trust. In June 1995, the **IRS** filed notice of a tax lien in Solano County against Donna Benedetti for unpaid taxes in the amount of $46,595.26.

Windsor Management Company, the trustee for the deed of trust, foreclosed on the Carsten property pursuant to California law and notified the **IRS** of the impending sale. In December 1996, Vardanega purchased the Carsten property for $105,881.47 at the trustee's foreclosure sale. He had actual knowledge of the **IRS**'s tax lien. On April 14, 1997, the **IRS** redeemed the Carsten property by sending a check to Vardanega for $107,970.09, the amount that he paid for the Carsten property plus statutory interest.

Although Vardanega was aware of the **IRS**'s tax lien, he believed that the **IRS** could redeem only the property interest against which it had a tax lien, i.e., Donna Benedetti's one-third, undivided interest, and he attempted to return to the **IRS** two-thirds of the amount of the check it had sent him. The **IRS** rejected the payment and recorded a certificate of redemption.

On May 16, 1997, Vardanega brought suit against the **IRS** to quiet title in the Carsten property and for partition, seeking a two-thirds, undivided interest. A few days later, the **IRS** sold the entire Carsten property to the GH-A Corporation for $172,300.00. Both Vardanega and the **IRS** filed motions for summary judgment, and on November 7, 1997, the district court granted summary judgment for the **IRS**.

II

When interpreting a statute, we first look to the plain language of the statute to interpret its provisions. "In statutory interpretation, the starting point is always the language of the statute itself." *Jeffries v. Wood*, 114 F.3d 1484, 1494 (9th Cir.), *cert. denied*, denied, 118 S. Ct. 586 (1997). If the language is clear, there is no need to look any further. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

{**1**] In this case, the statute plainly and unambiguously allows the **IRS** to redeem the entire real property that was sold at a foreclosure sale if any portion of the real property was subject to a federal tax lien prior to the foreclosure sale.

Section 7425(d) states:

> In the case of a sale of real property . . . to satisfy a lien prior to that of the United States, the Secretary may redeem such property within the period of 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer.
> 26 U.S.C. Section 7425(d) (1994).

[**2**] Vardanega argues that the term "such property" in the statute refers to the property interest on which the government has a tax lien. However, this would require a strained construction of the statute. The statute refers to "real property" which is sold, then provides for redemption of "such property." If Congress had intended to limit redemption to only a portion of the property, it could have stated so

explicitly. By its terms, section 7425 allows the **IRS** upon redemption to step into the shoes of the foreclosure purchaser, not those of the delinquent taxpayer. *See* 26 U.S.C. Section 7425(d)(3)(C) (1994) (stating that when the certificate of redemption is recorded, the United States obtains all the "rights, title, and interest in and to such property acquired by the person from whom the United States redeems such property by virtue of the sale of such property"); *see also Olympic Fed. Sav. & Loan Ass'n v. Regan*, 648 F.2d 1218, 1220 (9th Cir. 1981) ("[T]he Service takes the interest that the redemption acquired at the execution sale.").

[**3**] The statutory amount that the **IRS** is required to pay to the purchaser upon redemption also supports our holding. In order to redeem real property, the United States must pay the amount paid by the purchaser, plus interest and other costs. *See* 28 U.S.C. Section 2410 (1994) ("In any case in which the United States redeems real property . . . the amount to be paid for such property shall be the sum of . . . the actual amount paid by the purchaser at such sale"). (Section 2410's requirement that the **IRS** pay the entire purchase price compels our conclusion that the **IRS** redeems the whole property and not the equivalent of its tax lien.

[**4**] The legislative history also supports this interpretation. The Senate Report issued upon the passage of 26 U.S.C. Section 7425(d) discusses the **IRS**'s right of redemption. *See* S. Rep. No. 1708, *reprinted in* 1966 U.S.C.C.A.N. 3722. The Report states when when the government invokes its right to redeem, "it must pay the amount paid by the purchaser at the sale plus interest and expenses necessary to maintain the property from the time of sale." *Id* at 3750. It would be anomalous and quite expensive

if the government was required to pay the *entire amount* paid by the purchaser but could not redeem the *entire property* purchased by the purchaser.

The Senate Report also discusses Congress's purpose in granting the **IRS** a right of redemption under Section 7425: "[T]he Government can purchase property sold at distress prices and resell the property at a profit. This profit, of course, is applied in satisfaction of the taxpayer's liability . . . . [T]he exercise of this power, where the redeemed property is sold at a profit, inures to the benefit of delinquent taxpayers."
Id at 3753. Congress intended the redemption statute to prevent foreclosure purchasers from buying real property for less than the fair market value and then selling the real property and keeping the profit. Instead, Congress intended that any excess profit, after all prior liens were satisfied, to inure to the benefit of the taxpayer. *See id,; Delta Sav. & Loan Ass'n v.* ***IRS***, 847 F.2d 248, 251 (5th Cir. 1988). Thus, to prevent a potential windfall to a foreclosure purchaser, the **IRS** can repay the purchaser the purchaser price and sell the property at closer to fair market value. All excess profit then accrues for the benefit of the taxpayer — to pay off the taxpayer's tax liability. The **IRS**'s redemption right protects the taxpayer, who would otherwise be liable to the **IRS** for unpaid taxes but, under Vardanega's construction, would have lost the excess profit from the sale of his or her real property.[2]

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[2]The taxpayer's statutory right of redemption is instructive. Under 26 U.S.C. Section 6337, a delinquent taxpayer has a right of redemption when her property is sold at a tax sale by the **IRS**. *See* 26 U.S.C. Section 6337 (1994).

Finally, a number of cases illuminate the general scheme of Section 7425 and buttress our holding in this case. *See, e.g., Little v. United States*, 794 F.2d 484, 490 (9th Cir. 1986) (holding that the property interest redeemed by the government was equivalent to that held by the purchaser after the foreclosure sale); *Meek v. United States*, 26 Cl. Ct. 1357, 1358, 1361 n.5 (1992) (noting that, after the **IRS** redeemed real property on which it had a lien against one of the owners, the **IRS** owned the entire property because the foreclosure sale included the property interests of both owners), *aff'd by*, 6 F.3d 788 (Fed. Cir. 1993) (unpublished mem.).

Vardanega confuses two distinct **IRS** proceedings. If the **IRS** had levied on the Carsten property under 26 U.S.C. Section 6331, the **IRS**'s rights would be different. A Section 6331 levy "does not determine whether Government's rights to the seized property are superior to those of other claimants." *United States v. National Bank of Commerce*, 472 U.S. 713, 721 (1985). Instead, under Section 6331 the "**IRS** steps into the taxpayer's shoes" and has "whatever rights the taxpayer himself possesses." *Id.* at 725 (citations and internal quotation marks omitted). In such a situation, the

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This statute provides that not only the taxpayer, but her "heirs, executors, or administrators, or any person having any interest [in the property sold] shall be permitted to redeem the property sold . . . within 120 days." *Id.* It follows that the United States, pursuant to Section 7425, can redeem property in which it has a partial interest, in the same manner that property sold in a tax sale by the **IRS** can be redeemed by a person with only a partial interest in foreclosed property.

IRS would step in and obtain only Donna Benedetti's one-third, undivided interest. In the case of redemption under Section 7425, however, the **IRS** steps into Vardanega's shoes as long as it pays him the full purchase price.

III

[5] We also reject Vardanega's argument that the redemption statute itself constitutes a taking in violation of the Fifth Amendment. *See Bank of Hemet v. United States*, 643 F.2d 661, 666 (9th Cir. 1981); *Meek*, 26 Cl. Ct. at 1366 When Vardanega purchased the Carsten property, he purchased it with notice of an encumbrance — the statutory right of redemption by the United States, codified in 1966. Therefore, he did not purchase clear title to fee property, but property encumbered by a right of redemption. By exercising its statutory right of which Vardanega had notice, the **IRS** did not divest him of any vested property interest in violation of the Fifth Amendment.

[6] Further, Vardanega was reimbursed for all of the money he spent to purchase the Carsten property. What he "lost" was the right to get a windfall at the expense of the taxpayer and the other joint tenant owners of the Carsten property. Full compensation for property does not an unlawful taking make.

IV

Vardanega also challenges the wording of the certificate of redemption because it refers to the taxpayer's interest in the property. Although the wording could have been more precise, it suffices to express the intent of the

United States to redeem the entire Carsten property, particularly coupled with a tender of the full purchase price.

Moreover, this argument misapprehends the function of a redemption certificate. A certificate of redemption "serves merely to evidence that redemption occurred and to transfer legal title of the redeemed interest." *Southwest Prods. Co. v. United States*, 882 F.2d 113, 118 (4th Cir. 1989). Redemption is completed by tender of a check to the purchaser for the purchase price. *See Id.* at 117. At that point, not at the time of the certificate filing, the **IRS** steps into the shoes of a purchaser and acquires the purchaser's interest.

In this case, redemption was complete when the **IRS** sent the full purchase price to Vardanega. Because the **IRS** sent Vardanega the amount that he paid for the Carsten property, the **IRS** redeemed the entire Carsten property.

Accordingly, we affirm.
AFFIRMED.

EXHIBIT B ---ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT OF THE HONORABLE MILTON L. SCHWARTZ, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FILED NOVEMBER 7, 1997 IN CASE NO. CIV-S-97-938 MLS/JFM

PAUL L. SEAVE
United States Attorney
650 Capitol Mall
Sacramento, California 95814
Telephone: (916) 554-2700
DIANA P. NOWEZKI
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 307-6572
Attorneys for the United States of America

FILED DEC. 1, 1997

IN THE UNITED STATEMENT DISTRICT COURT FOR FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT VARDANEGA,

Plaintiff

vs

UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE and DOES 1-100

Defendants

Civ. No. S-97-938-MLS-JFM

ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

COVER SHEET

PAUL L. SEAVE
United States Attorney
650 Capitol Mall
Sacramento, California 95814
Telephone: (916) 554-2700

DIANA P. NOWEZKI
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 307-6572

Attorneys for the United States of America

IN THE UNITED STATEMENT DISTRICT COURT FOR

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT VARDANEGA,	Civ. No. S-97-938-MLS-JFM
Plaintiff,	**ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT**
vs	
UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE,	Date: November 7, 1997 Time: 9:30 a.m. Courtroom: Hon. Milton L. Schwartz
and DOES 1-100 Defendants	

On November 7, 1997, a hearing was held on the parties' Cross-Motions for Summary Judgment, filed in the instant action. This case is an action to quiet title to a parcel of real estate that plaintiff originally purchased at a non-judicial sale, but which was subsequently redeemed by the United States pursuant to 26 U.S.C. Section 7425(d). Paul H. Greisen, Esquire appeared on behalf of plaintiff. Diana P. Nowezki, Trial Attorney, Tax Division, U.S. Department of Justice, appeared on behalf of the United States. At the hearing that was held, the Court announced its disposition of the parties' Cross-Motions for Summary Judgment and its reasons therefor. A transcript of the hearing is attached hereto and its findings are specifically incorporated herein by reference.

For the reasons set forth in the transcript attached hereto, the plaintiff's Motion for Summary Judgment is DENIED. Furthermore, the United States' Motion for Summary Judgment is GRANTED. Accordingly, the Clerk is hereby directed to enter judgment on the Complaint in favor of the United States. Plaintiff shall take nothing by way of his Complaint.

IT IS SO ORDERED.

DATED: 11/25/97 s/s Milton L. Schwartz
HON. MILTON L.SCHWART Z

Submitted by:
PAUL L. SEAVE
United States Attorney
/s/ Diana P. Nowezki
DIANA P. NOWEZKI
Trial Attorney, Tax Division, U.S. Dept. of Justice
P.O. Box 683, Ben Franklin Station, Washsington, D.C.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 2nd day of November, 1997, I served a copy of the attached **[PROPOSED] ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT** by regular mail in an envelope addressed to the persons listed below:

CARY P. GREISEN, ESQUIRE
Greisen Law Corporation
2230 L Street
Sacramento, California 95816

PETER WINN
Westminster Investments
P.O. Box 34167
San Diego, California 92163

/s/ Diana P. Nowezki
Diana P. Nowezki
Trial Attorney, Tax Division
U.S. Department of Justice

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

BEFORE THE HONORABLE MILTON L. SCHWARTZ,
JUDGE

ROBERT VARDANEGA,

Plaintiff, No. CV S 97-938 MLS

vs

INTERNAL REVENUE SERVICE,

Defendant

_____/

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REPORTER'S TRANSCRIPT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

FRIDAY, NOVEMBER 7, 1997

---oOo---

Reported by: MARGARET A. McNAMARA CSR #6729

Exhibit B - 16

APPEARANCES

For the Plaintiff:

GREISEN LAW CORPORATION
By: Cary Paul Greisen, Atty at Law
2230 L Street
Sacramento, California 95816

For the Defendant:

UNITED STATES DEPARTMENT OF JUSTICE - Tax Division
By: Diana P. Nowezki, Atty at Law
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044-0683

So therefore this is the enunciation of the court's decision and its rulings. This case is before the court on cross-motions for summary judgment. Plaintiff, Robert Vardanega, commenced this action on May 16, 1997. He names as defendants the United States and the Internal Revenue Service, and seeks to quiet title to a piece of real estate located at 821 Carstein Circle in Benicia, California.

This property was previously owned by Donna Marie Benedetti, Dorothy Louise Wildes and Cathleen Marie Benedetti as equal joint tenants. That's what it says, but joint tenants are equal. So that's kind of a redundancy.

These individuals obtained a loan on the property which was secured by a deed of trust. On June 13, 1995 the IRS filed a notice of tax lien against Donna Marie Benedetti encumbering her interest in the property. Because this lien was filed after the deed of trust the IRS was a junior lienholder.

Thereafter the trustee, under the deed of trust, commenced foreclosure proceedings or sale in lieu of foreclosure. Because of the tax lien on the property the IRS was notified of the pending foreclosure. At the trustee's sale conducted on December 18, 1996, plaintiff purchased the property for $105,381.47.

Subsequently the United States, acting through the IRS, purported to acquire this property from plaintiff by exercising a right of redemption arising from the preexisting tax lien. The IRS tendered to plaintiff a check for $107,970.09 and recorded a Certificate of Redemption in Solano County on April 15, 1997. Thereafter the IRS sold the property to GH-A Corporation for $172,300.00.

Although plaintiff had knowledge of the tax lien at the time he purchased the property, he assumed that any right of redemption in favor of the IRS would extend only to one-third of the property. I state parenthetically that I accept this as the most favorable interpretation of the facts because it was pled on plaintiff's behalf by plaintiff's moving papers, and therefore for purposes of this analysis I accept those facts.

Consistent with this belief plaintiff attempted to return two-thirds of the redemption amount back to the IRS. Plaintiff has instituted the present action to quiet title to two-

thirds of the property in his name. He also requests a partition as well as declaratory relief.

Defendants initially contested jurisdiction in this case but have subsequently withdrawn this challenge. Defendants now concede that jurisdiction is proper under 28 U.S.C. Section 2409(a). This statute has been construed to authorize suit against the United States where the Government claims title to the subject property at the time the complaint was originally filed. See Bank of Hemet vs. United States, 643 Fed 2d 661 (Ninth Circuit 1981).

Because the United States Government claimed title to the property on the date the plaintiff filed his complaint, this section does provide the requisite jurisdiction. Both parties now move for summary judgment.

Federal Rule of Civil procedure 56(c) provides that summary judgment is appropriate when the court is satisfied that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In summary judgment practice, the moving party bears the initial responsibility of informing the District Court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. vs. Catrettt, 477 U.S. 317, 323 (1986).

If the moving party meets its initial responsibility the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact. That's Matsushita Electronic Industries vs. Zenith Radio Corp., Ltd., 475 U.S 574, 585 to 586 (1986). The evidence of the non-

moving party must be believed and all reasonable interferences that can be drawn from that evidence must be drawn in favor of the non-moving party. Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Here, the dispute centers on an interpretation of a statutory right of redemption codified at 26 United States Code Section 7425. This statute creates a right of redemption in favor of the IRS when property on which it claims a tax lien is sold at a non-judicial sale to satisfy a senior lienholder. See 26 U.S.C Section 7425(d)(1).

This right of redemption allows the IRS to acquire the property from the individual who purchases it at the foreclosure sale. The IRS can then resell the property to a third party free and clear of the tax lien and use any profit obtained to satisfy the tax debt.

In this case, while the parties agree that the IRS had a right of redemption, they disagree on the precise scope of that right. Defendants contend that the right to redeem extends to whatever interest was sold at the trustee sale. Plaintiff, on the other hand, contends that when a tax lien applies to jointly-owned property, the right to redeem is correspondingly limited to the delinquent taxpayer's pro rata share of that property.

Plaintiff tries to support this contention with various policy justifications, none of which are persuasive to the court. Plaintiff first suggests that the right of redemption is akin to levying and seizing property. However, the power to seize and the power to redeem are two entirely independent methods of collecting a tax debt, each of which is governed

by its own set of procedures. Plaintiff's suggestion that these methods of collection should be similarly construed is not supportable.

Furthermore plaintiff asserts that allowing the Government to redeem the entire property produces an improper windfall to a delinquent taxpayer. This contention is equally unpersuasive to the Court.

Congress expressly contemplated that any equity or profit realized upon redemption would inure to the benefit of delinquent taxpayers. See Senate report number 1708, reprinted in 1966, U.S.C.C.A.N 3722 at 3753. Congress further emphasized the importance of redemption as a method of tax collection, recognizing that it may provide the only mechanism for recovering unpaid taxes.

As a result, plaintiff's contention that allowing the IRS to redeem the property produces an improper benefit to a delinquent taxpayer must fail. In sum, the various policy justifications that plaintiff offers simply do not persuade the Court that the right of redemption should be limited to the taxpayer's prior interest in the property.

Accordingly, the Court finds that the IRS has a right to redeem whatever property interest is sold by a foreclosing senior lienholder. In this case since the interest of all three co-owners was sold at the trustee's sale, the IRS had a right to acquire complete ownership of the property by exercising its right of redemption.

Other courts, to interpret the redemption statute, appear to subscribe to this same view. See Olympic Federal

Savings and Loan Association vs. Regan, 648 Fed 2d 1218, 1220 (Ninth Circuit 1981) Meek vs. United States, 26 Claims Court Reporter 1357, 1361 note 5 (U.S. Claims Court 1992).

Plaintiff vigorously disputes any reliance on the foregoing authorities. Although these cases may not properly — I'm sorry. Although these cases may not provide binding precedent, they are nonetheless instructive to this Court because they involved interpretations of the same redemption statute.

Moreover, the formula statutorily created for calculating the proper amount of redemption provides additional support. This formula assumes that the IRS will be redeeming whatever interest the purchaser at the foreclosure sale acquired. See 26 U.S.C. Section 7425(d)(2) and 28 U.S.C. Section 2410(d).

In addition to offering an interpretation of the redemption statute, plaintiff alternatively argues that the certificate of redemption limits the interest that the IRS redeemed. Even if the IRS had a legal right to acquire 100 percent ownership, plaintiff contends that the IRS here only actually redeemed one-third of the property. In support of this contention, plaintiff relies on the following language taken from the Certificate of Redemption filed by the IRS in Solano County on April 15, 1997.

"Now, therefore, all rights, title and interest of Donna Marie Benedetti acquired by Robert Vardanega is hereby transferred to United State of America by virtue of its exercise of its right of redemption pursuant to Section 7425(d), Title 26, United States Code." See Certificate of

Redemption attached as exhibit 5 to plaintiff's opposition.

Plaintiff contends that this language expressly limits the IRS to acquiring Donna Marie Benedetti's interest. This contention is not persuasive. The law entitles the IRS to acquire complete ownership of the property as evidenced by the following statutory provisio

.

"A certificate of redemption executed by the secretary shall constitute prima facie evidence of the regularity of such redemption and shall, when recorded, transfer to the United States all the rights, title and interest in
and to such property acquired by the person from whom the United States redeemed such property by virtue of the sale of such property." 26 U.S.C Section 7425(d)(3)(c). Based on this statute the filing of the Certificate of Redemption is solely a ministerial act.

As a result, any language contained within it neither alters nor reduces the interest that the law entitles the Government to acquire. Therefore in spite of any purported limitations contained in the certificate, the Court finds that in exercising its right of redemption the IRS acquired complete ownership of the property from plaintiff.

Accordingly defendant's motion for summary judgment must be and hereby is granted.

Will you make arrangements with the reporter, counsel, to simply get a copy of the transcript of this and attach it to a proposed order granting your motion and then send it to me, but at the same time a copy to opposing counsel to see if he has any objection to the language, or whatever,

that might be in it.

MS. NOWEZKI Certainly, your Honor.

THE COURT: Anything additional?

MS. NOWEZKI: When would the court like that order submitted?

THE COURT: It depends on how long it takes the reporter to get the transcript. I'll simply flag it if I haven't had an order from you within two weeks to call and find out where it is.

MS. NOWEZKI: Okay. Thank you, your Honor.

MR. GREISEN: Thank you, your Honor.

THE COURT: Thank you.

(Whereupon the proceedings were adjourned.)

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REPORTER'S CERTIFICATE

---oOo---

STATE OF CALIFORNIA)
) ss
COUNTY OF SACRAMENTO)

I, MARGARET A. McNAMARA, certify that I was the official Court Reporter, and that I reported verbatim in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 1 through 15, inclusive, constitute a complete, true, and correct record of said proceedings:

COURT: U.S. District Court
Eastern District of California

JUDGE: Honorable EDWARD J. GARCIA
Judge

CAUSE: VARDANEGA vs. U.S.
Case No. CV S 97-938 MLS

DATE: Friday, November 7, 1997

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on the 14th day of November, 1997.

_____
MARGARET A. McNAMARA
CSR No. 6729

EXHIBIT C — JUDGMENT IN A CIVIL CASE, CASE NO. S-97-938 MLS/JFM, filed December 1, 1997

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Filed Dec. 1, 1997

Robert Vardanega

v.

United States of America
Internal Revenue Service

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CIV S-97-938 MLS JFM

XX - - **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 12/1/97.

Jack L. Wagner
Clerk of the Court

ENTERED: December 1, 1997

by: s/s M. Price
M. PRICE, Deputy Clerk

EXHIBIT D — ORDER DENYING APPELLATE PETITION FOR REHEARING DATED 23, 1999

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed Apr. 23, 1999
Cathy A. Catterson
Clerk, U.S. Court of Appeals

ROBERT VARDANEGA — No. 97-17301

Plaintiff-Appellant — D.C.No. CV097-00938-MLS/JFM

v.

ORDER

INTERNAL REVENUE SERVICE,

Defendant-Appellee

Before: WOOD[3], THOMPSON, and THOMAS, Circuit Judges.

The appellant's petition for rehearing is DENIED.

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[3] The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation..

EXHIBIT E — 26 U.S.C., SECTION 7425

Section 7425 - Discharge of Liens

(a) Judicial proceedings. — If the United States is not joined as a party, a judgment in any civil action or suit described in subsection (a) of section 2410 of title 28 of the United States Code, or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title ---

(1) shall be made subject to and without disturbing the lien of the United States if notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced, or

(2) shall have the same effect with respect to the discharge or divestment of such lien of the United States as may be provided with respect to such matters by the local law of the place where such property is situated, if no notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced or if the law makes no provision for such filing.

If a judicial sale of property pursuant to a judgment in any civil action or suit to which the United States is not a party discharges a lien of the United States arising under the provisions of this title, the United States may claim, with the

same priority as its lien had against the property sold, the proceeds (exclusive of costs) of such sale at any time before the distribution of such proceeds is ordered.

(b) Other sales. --- Notwithstanding subsection (a) a sale of property on which the United States has or claims a lien, or a title derived from enforcement of a lien, under the provisions of this title, made pursuant to an instrument creating a lien on such property, pursuant to a confession of judgment on the obligation secured by such an instrument, or pursuant to a nonjudicial sale under a statutory lien on such property ----

(1) shall, except as otherwise provided, be made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or recording more than 30 days before such sale and the United States is not given notice of such sale in the manner prescribed in subsection (c)(1); or

(2) shall have the same effect with respect to the discharge or divestment of such lien or such title of the United States, as may be provided with respect to such matters by the local law of the place where such property is situated, if ---

(A) notice of such lien or such title was not filed or recorded in the place provided by law for such filing more than 30 days before such sale,

(B) the law makes no provision for such filing, or

(C) notice of such sale is given in the manner prescribed in subsection (c)(1).

(c) Special rules. ---

(1) Notice of sale. --- Notice of a sale to which subsection (b) applies shall be given (in accordance with regulations prescribed by the Secretary) in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary.

(2) Consent to sale. --- Notwithstanding the notice requirement of subsection (b)(2)(C), a sale described in subsection (b) of property shall discharge or divest such property of the lien or title of the United States if the United States consents to the sale of such property free of such lien or title.

(3) Sale of perishable goods. --- Notwithstanding the notice requirement of subsection (b)(2)(C), a sale described in subsection (b) of property liable to perish or become greatly reduced in price or value by keeping, or which cannot be kept without great expense, shall discharge or divest such

property of the lien or title of the United States if notice of such sale is given (in accordance with regulations prescribed by the Secretary) in writing, by registered or by certified mail or by personal service, to the Secretary before such sale. The proceeds (exclusive of costs) of such sale shall be held as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the property sold, for not less than 30 days after the date of such sale.

(4) **Forfeiture of land sales contracts.** --- For purposes of subsection (b), a sale of property includes any forfeiture of a land sales contract.

(d) Redemption by United States. ---

(1) **Right to redeem** --- In the case of a sale of real property to which subsection (b) applies to satisfy a lien prior to that of the United States, the Secretary may redeem such property within the period of 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer.

(2) **Amount to be paid.** --- In any case in which the United States redeems real property pursuant to paragraph (1), the amount to be

paid for such property shall be the amount prescribed by subsection (d) of section 2410 of title 28 of the United States Code.

(3) Certificate of redemption. ---

(A) In general. --- In any case in which real property is redeemed by the United States pursuant to this subsection, the Secretary shall apply to the officer designated by local law, if any, for the documents necessary to evidence the fact of redemption and to record title to such property in the name of the United States. If no such officer is designated by local law or if such officer fails to issue such documents, the Secretary shall execute a certificate of redemption therefor.

(B) Filing. --- The Secretary shall, without delay, cause such documents or certificate to be duly recorded in the proper registry of deeds. If the State in which the real property redeemed by the United States is situated has not by law designated an office in which such certificate may be recorded, the Secretary shall file such certificate in the office of the clerk of the

United States district court for the judicial district in which such property is situated.

(C) **Effect.** — A certificate of redemption executed by the Secretary shall constitute prima facie evidence of the regularity of such redemption and shall, when recorded, transfer to the United States all the rights, title and interest in and to such property acquired by the person from whom the United States redeems such property by virtue of the sale of such property.

EXHIBIT F — ARTICLES IN ADDITION TO AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment, or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.